Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-261

LEROY BARNES, STEVEN BAKER, JOSEPH HAYDEN, JOHN HATCHER, WAYMIN HINES, JAMES MCCOY, WALLACE FISHER, WALTER CENTENO, LEON JOHNSON, STEVEN MONSANTO and LEONARD ROLLOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENT TO THE PETITION

EDWARD M. CHIKOFSKY
Attorney for Petitioners
866 United Nations Plaza
New York, New York 10017
(212) 753-1402

DAVID BREITBART
MICHAEL YOUNG
JOEL A. BRENNER
HELENE M. FREEMAN
MARK S. ARISOHN
J. JEFFREY WEISENFELD
MARK L. AMSTERDAM
BARRY A. BOHRER
JOSEPH T. KLEMPNER
MEL A. SACHS
IRA A. DEUTSCH
Of Counsel

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Petitioners Leroy Barnes, Steven Baker, Joseph Hayden, John Hatcher, Waymin Hines, James McCoy, Wallace Fisher, Walter Centeno, Leon Johnson, Steven Monsanto and Leonard Rollock respectfully submit the instant Supplement to the Petition for a Writ of Certiorari filed in this case on August 17, 1979, pursuant to Rule 24(5) of the Rules of the Supreme Court, in order to bring to the Court's attention intervening matters not available at the time of the initial filing of the Petition.

Preliminary Statement

On October 1, 1979, this Court granted certiorari in *Roberts* v. *United States,* No. 78-1793, 48 U.S.L.W. 3185 (October 2, 1979), agreeing to review the question of whether, in light of *United States* v. *Grayson,* 438 U.S. 41 (1978), a trial judge may take into account and consider as a sentencing factor a defendant's failure to cooperate with the Government and become an informant in imposing a maximum sentence upon him. *See, United States* v. *Roberts,* 600 F.2d 815 (D.C. Cir. 1979) (*per curiam*) (Bazelon, J., dissenting from the denial of rehearing *en banc*).

Petitioners herein had raised the identical issue before the Court of Appeals and the Court there ruled adversely that in imposing sentence, "the Court may consider a defendant's cooperation or lack thereof as long as *all* factors are considered." (Pet. App. 53a-55a). At the time of filing the petition for a writ of certiorari in the instant case—August 17, 1979—petitioners herein were wholly unaware that a petition for certiorari was pending in *Roberts* and, indeed, the D.C. Circuit's *per curiam* affirmance in that case was not officially reported until September 1979—almost one month after the instant petition already had been filed.

Accordingly, in light of these intervening events, which have materially changed the posture of the instant case, petitioners respectfully submit this Supplement to the Petition in order to bring before the Court an additional Question Presented, properly raised before the Court of Appeals, regarding whether a trial court may consider a defendant's failure to cooperate with the Government as a negative factor in imposing sentence.

No prejudice to the Government is likely to ensue from the additional Question Presented in light of the fact that the issue in this case already had been raised and fully

litigated before the Court of Appeals. Moreover, the Government, in any event, has been granted an extension of time until October 23, 1979 within which to respond to the petition, and, thus, will have sufficient advance notice of the additional Question Presented in order to be able to respond properly thereto.*

Accordingly, in light of intervening events transpiring subsequent to the time of the initial filing of the petition, the close identity of issues in this case and the matter to be reviewed in *Roberts,* as well as the total absence of prejudice to the Government, it is respectfully submitted that the Court give consideration to the additional Question Presented herein. Rule 24(5), Rules of the Supreme Court; *Costello* v. *United States,* 365 U.S. 265, 284 (1961); *Grand Trunk Western R. Co.* v. *James,* 358 U.S. 915 (1958).

Supplemental Question Presented

4. Whether a trial court may consider a defendant's failure to cooperate with the Government as a negative factor in imposing sentence.

REASONS FOR GRANTING THE WRIT

IV

The Court of Appeals erred in holding that a trial court may consider a defendant's failure to cooperate with the Government as a negative factor in imposing sentence.

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* In order to provide the Government with the maximum advance notice of this new development, counsel for petitioners notified the Department of Justice by telephone and letter on October 11, 1979 of the contemplated filing of the instant Supplement. A copy of this letter has been filed separately with the Clerk.

In *United States* v. *Ramos,* 572 F.2d 360 (2d Cir. 1978), the Second Circuit ruled that a defendant's failure to cooperate with the Government may not be considered as a permissible negative sentencing consideration and that any such sentence must be vacated. Relying on the Third Circuit's decision in *United States* v. *Garcia,* 544 F.2d 681 (3d Cir. 1976), the court vacated Ramos' sentence outright, specifically holding that a defendant's silence and failure to cooperate was not a permissible factor to be considered negatively in imposing sentence.*

Flying directly in the face of both *Ramos* and *DiGiovanni* (as well as the extensive authority underlying each), the Majority herein held that, quite the contrary, the sentencing court "may consider a defendant's cooperation or lack thereof as long as *all* factors are considered" (55a). Citing as its authority the Court's earlier decision in *United States* v. *Vermeulen,* 436 F.2d 72 (2d Cir. 1970)—which itself had been distinguished in *Ramos* (572 F.2d at 363 n.2)—the Majority ruled that, contrary to *Ramos, DiGiovanni* and *Sweig* and in purported reliance on *Vermeulen,* the sentencing court *may* take lack of cooperation into account in imposing sentence so long as it is only one of the factors involved (53a-55a).

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* The *Ramos* principle subsequently was reaffirmed in *DiGiovanni* v. *United States,* 596 F.2d 74 (2d Cir. 1979), wherein the sentencing court's imposition of a "more serious sentence" because of defendant's refusal to cooperate with the authorities was vacated by the court. As noted by Judge Lumbard:

> "A defendant's cooperation with the authorities is, of course, one of the mitigating factors that may be taken into account by the sentencing judge, *see, e.g., United States* v. *Sweig,* 454 F.2d 181 (2d Cir. 1972), but as was noted in *United States* v. *Ramos,* 572 F.2d 360, 363, n.2 (2d Cir. 1978) (Lumbard, J., concurring), 'It is one thing to extend leniency to a defendant who is willing to cooperate with the government; it is quite another thing to administer additional punishment to a defendant who by his silence has committed no additional offense.'"

Id., 596 F.2d at 75.

The confusion that the Majority herein has now engendered as well as the logical and practical irreconcilability of the Court's opinion with *Ramos, DiGiovanni, Garcia* and *Roberts,* plainly necessitates clarification by this Court and the granting of certiorari herein. Rule 19(1)(b), Rules of the Supreme Court.

Even in the absence of *Ramos,* innumerable decisions long have recognized that punishing a defendant for refusal either to admit guilt or to cooperate violates the Fifth Amendment privilege against self-incrimination. *See, e.g., Scott* v. *United States,* 419 F.2d 264 (D.C. Cir. 1969); *LeBlanc* v. *United States,* 391 F.2d 916 (1st Cir. 1968); *United States* v. *Roberts, supra,* 600 F.2d at 817 & n.7 (Bazelon, J., dissenting from denial of rehearing *en banc*) (and cases cited therein), *cert. granted,* 48 U.S.L.W. 3185 (October 2, 1979).

In *United States* v. *Garcia, supra,*—relied upon in *Ramos*—the Third Circuit described precisely the dilemma confronting these defendants:

> In order to obtain lenity . . . appellants were in effect coerced to furnish the prosecutor with factual information of a broader and potentially unlimited factual scope. And they were required to disgorge this information without any assurance of immunity from future federal or state prosecutions resulting from the information supplied by them.
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> • • •
>
> The appellants were put to a Hobson's choice; remain silent and lose the opportunity to be the objects of leniency, or speak and run the risk of additional prosecution. A price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice: they had to waive the protection afforded them by the Fifth Amendment. This price was too

high. We, therefore, cannot permit the sentences to stand.

Id., 544 F.2d at 684-85.

The Fifth Circuit likewise indicated that the Fifth Amendment bars the imposition of a more severe sentence than otherwise would have been imposed because of defendant's failure to confess or to identify other members of the conspiracy. *United States* v. *Rogers*, 504 F.2d 1079, 1084-85 (5th Cir. 1974); *United States* v. *Acosta*, 501 F.2d 1330, 1337-38 (5th Cir. 1974), *dissenting opinion adopted en banc*, 509 F.2d 539 (5th Cir. 1975).

Here, by contrast, the sentencing judge stated explicitly on two separate occasions that he took into consideration the failure of *all* defendants to cooperate "in making these sentences" and that it was, moreover, a factor upon which he placed "great emphasis".*

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* Immediately upon sentencing petitioner Monsanto, the Court stated:

> I should also note for the record that the Court took into consideration the fact that this defendant—actually no defendant in connection with this case—has cooperated and *the Court is entitled to take into consideration in making these sentences the fact that* [sic] *non-cooperation as well as the fact of cooperation and in this day and age where heroin is the disease which we do not seem to be able to stamp out, I place great emphasis* on the question of cooperation. (emphasis added).

In the course of sentencing petitioner Baker, the district judge reiterated his reliance on all defendants' failure to cooperate:

> I also consider you have failed as have *all of the other defendants*, to cooperate with the government in this connection, and that only through *the cooperation of these defendants* will we in some way make a dent into the drug traffic. (emphasis added).

Indeed, petitioners' failure to cooperate was repeatedly urged upon the court as a negative factor by the Government in its Sentencing Memorandum and in its repeated remarks during the various sentences (Baker Sentence); (Johnson Sentence); (Rollock Sentence); (Hines Sentence).

Furthermore, the sentences imposed here were extraordinarily severe. One defendant received a life sentence without possibility of parole, five others received maximum thirty-year sentences, and another received the maximum fifteen-year sentence permitted under the statute. Petitioners Hatcher and Baker, despite having no prior criminal record, received the same maximum thirty-year sentence as those defendants who did. Contrary to the Majority's assertion (54a), the virtually uniform maximum sentences imposed herein effectively belie any serious consideration of individualized sentencing factors.

If permitted to stand, the ramifications of the Majority's ruling herein (as well as that of *Roberts*) are potentially far-reaching in the day to day administration of criminal sentencing throughout the Nation. To what degree may failure to cooperate now be considered as a factor? May it be used merely to enhance otherwise lawful sentences or may sentences of "*in terrorem* proportions" be imposed to induce cooperation? (*Cf.*, *Ramos*, 572 F.2d at 363 (Lumbard, J., concurring)). The Majority opinion provides nary a clue.

Consideration by this Court, accordingly, is clearly warranted of the Majority's wholly ill-conceived—and improvident—abridgement of petitioners' Fifth Amendment rights in the context of sentencing proceedings. Accordingly, for all the same reasons asserted in *Roberts* v. *United States*, *supra*, the petition for a writ of certiorari herein similarly should be granted.

CONCLUSION

The petition for a writ of certiorari, and the supplement to the petition, should be granted.

Dated: New York, New York
October 17, 1979

Respectfully submitted,

EDWARD M. CHIKOFSKY
Attorney for Petitioners
866 United Nations Plaza
New York, New York 10017
(212) 753-1402

DAVID BREITBART
MICHAEL YOUNG
JOEL A. BRENNER
HELENE M. FREEMAN
MARK S. ARISOHN
J. JEFFREY WEISENFELD
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